Hock Wee Nurseries Sdn Bhd v Fajar Saga Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–490 OF 2004
VERNON ONG J
28 SEPTEMBER 2010

Tort — Negligence — Adjoining properties — Construction works caused damage to adjoining property — Failure to take reasonable preventive measures and failure to comply with prescribed conditions — Whether defendant liable for negligence — Whether defendant breached duty of care to plaintiff

The plaintiff and defendant were owners and occupiers of adjoining plots of land in Kota Tinggi, Johor. At all material times the plaintiff was carrying out orchid farming activities on his land while the defendant was developing its land into a housing project. Some time about 28 December 2001, a stream which ran from the plaintiff's land, which wass situated upstream, to the defendant's land, which was situated downstream, burst its banks and flooded the plaintiff's orchid farm. The plaintiff commenced an action against the defendant for loss and damages caused by flood waters from the defendant's land inundating the plaintiff's orchid farm. The plaintiff submitted that it had been carrying out orchid farming activities since 1992 without any event of flooding on its farm and that the earth works and tree felling activities carried out by the defendant on its land had caused the flooding to occur. The plaintiff also submitted that the construction of the temporary earth road across the defendant's stream and the negligent placement of unsuitable and small culverts underneath this road had obstructed and hindered the natural free flow of the stream. Thus, it was the plaintiff's case that the earth works and construction works were carried out negligently by the defendant and that this caused the stream to burst its banks and flood the plaintiff's orchid farm during a downpour, on about 28 December 2001. The plaintiff also alleged that the flood waters had submerged the plaintiff's orchid plants and damaged the plaintiff's properties. The defendant submitted that the construction works carried out on its lands were guided by it's surveyors, engineers and architects and approved by the relevant authorities. It further submitted that both pieces of land were situated in flood prone areas and that the flood which occurred was an act of God that was beyond the defendant's control. During the trial, evidence was adduced to show that the Majlis Daerah Kota Tinggi ('MDKT') had granted the defendant approval to start earthworks and infrastructure works on its land subject to certain conditions. The conditions imposed by MDKT required the defendant to take the necessary measures to prevent landslides, floods and the like from occurring to the defendant's land and surrounding areas. However, an engineer from MDKT testified that a stop

work order was issued against the defendant when it did not satisfy certain conditions. Evidence also came to light that according to the approved plans the defendant was required to build a concrete bridge of certain proportions over the stream but that it instead built a temporary earth road and installed three culverts under the stream. The reports of a consulting engineer and civil engineer who visited the defendant's land after the flooding incident and saw the destruction and damage to the plaintiff's land were also adduced to support the plaintiff's claim that the temporary earth road built by the defendant was the cause of the flood. The primary issue in this case was whether the flood which inundated the plaintiff's orchid farm on 28 December 2001 was brought about by the defendant's negligence.

Held, allowing the plaintiff's claim with costs:

(1) The defendant owed the plaintiff a duty of care as the plaintiff clearly fell within the category of persons so closely and directly affected by the defendant's act that the defendant ought reasonably to have the plaintiff in contemplation as being so affected when the defendant was directing its mind to the acts or omissions which were called in question. In considering whether the defendant breached that duty, the court had to consider the peculiar facts of this case. From the facts as disclosed in the evidence it was obvious that when the defendant failed to build the concrete bridge over the stream in accordance with the approved plans and failed to comply with the MDKT conditions it omitted to do what it ought to have done. This breach of duty was further compounded when the defendant built the temporary earth road over the stream and installed the culverts under the stream because there was no approval given for these activities. As such the defendant had breached the duty of care to take the necessary steps and measures to prevent landslides, floods and the like from happening to the plaintiff's land (see paras 12 & 21).

(2) The plaintiff had adduced evidence to show that the flood was brought about by the backflow of water due to the obstruction of stream caused by the defendant. The defendant claimed that the lands were flood prone areas but these allegations proved to be merely speculative. Further if this allegation was plausible, the defendant's land would not be suitable to be developed into a housing estate. The allegation was also contradicted by records that there had never been flooding on this scale from 1998–2001. The defendant's contention that the flood was an act of God was also unsubstantiated, misconceived and contrary to the facts. On the totality of the evidence, it was found that the loss and damage to the plaintiff's land was caused by the defendant's breach of its duty of care (see paras 23 & 25).

(3) The conditions set out by MDKT clearly set out the measures to be taken by the defendant to ensure that no landslides, flash floods and the like occur. The defendant would also have reasonable foreseen that the backflow of floodwaters into the plaintiff's orchid farm would destroy the orchid plants, equipment and property on the farm. As such the loss and damage to the plaintiff's orchid farm and the economic loss to the plaintiff was reasonable foreseen by the defendant (see para 20 & 26).

[Bahasa Malaysia summary

Plaintif dan defendan merupakan pemilik dan mendiami petak tanah yang bersebelahan di Kota Tinggi, Johor. Pada kesemua masa yang material plaintif menjalankan aktiviti penanaman bunga orkid di atas tanahnya dan defendan memajukan tanahnya menjadi projek perumahan. Kira-kira pada 28 Disember 2001, sebuah sungai yang mengalir dari tanah plaintif, yang terletak di hulu sungai, ke tanah defendan, yang terletak di hilir sungai, memecahkan tebing sungai dan membanjiri kebun bunga orkid plaintif. Plaintif memulakan tindakan terhadap defendan untuk kehilangan dan ganti rugi yang disebabkan kebanjiran tersebut dari tanah defendan yang membanjiri kebun bunga orkid plaintif. Plaintif berhujah bahawa ia telah menjalankan aktiviti penanaman bunga orkid semenjak 1992 dan tiada kebanjiran pernah berlaku di kebunnya dan bahawa kerja-kerja tanah dan penebangan pokok yang dijalankan defendan di atas tanah yang menyebabkan banjir tersebut berlaku. Plaintif juga menghujah bahawa kerja-kerja pembinaan jalan tanah sementara merentasi sungai defendan dan juga meletakkan pembentung kecil di bawah jalan tersebut yang tidak bersesuaian dan secara cuai telah menghalang dan menyekat laluan semulajadi sungai tersebut. Oleh itu, adalah menjadi kes plaintif bahawa kerja-kerja tanah dan pembinaan dilaksanakan secara cuai oleh defendan dan ini menyebabkan sungai tersebut memecahkan tebingnya dan membanjiri kebun bunga orkid plaintif semasa hujan lebat pada kira-kira 28 Disember 2001. Plaintif juga mendakwa bahawa banjir tersebut telah menenggelamkan tanaman bunga orkid plaintif dan merosakkan harta bendanya. Defendan menghujahkan bahawa kerja-kerja pembinaan yang dijalankan di atas tanahnya berpandukan juruukur tanah, jurutera dan arkiteknya dan diluluskan pihak-pihak berkuasa yang berkenaan. Defendan seterusnya menghujahkan bahawa kedua-dua tanah terletak dalam kawasan banjir dan banjir yang berlaku merupakan bencana alam di luar kawalan defendan. Semasa perbicaraan, keterangan yang dikemukakan menunjukkan bahawa Majlis Daerah Kota Tinggi ('MDKT') telah memberikan kelulusan kepada defendan untuk memulakan kerja-kerja tanah dan infrastruktur atas tanahnya tertakluk kepada beberapa syarat. Syarat-syarat yang dikenakan oleh MDKT memerlukan defendan mengambil beberapa langkah untuk mengelakkan tanah runtuh, banjir dan yang sepertinya daripada berlaku ke atas tanah defendan dan kawasan persekitarannya. Walau bagaimanapun, seorang jurutera daripada MDKT memberi keterangan bahawa perintah pemberhentian kerja telah dikeluarkan terhadap defendan apabila ia tidak

berpuas hati dengan beberapa syarat tersebut. Keterangan juga menunjukkan bahawa menurut pelan-pelan yang telah diluluskan, defendan dikehendaki membina jalan tanah sementara dan memasang tiga pembentung di bawah sungai tersebut. Laporan-laporan jurutera perunding dan jurutera awam yang melawat tanah defendan selepas kejadian banjir tersebut telah melihat kemusnahan dan kerosakan atas tanah plaintif juga memberi sokongan kepada tuntutan plaintif bahawa jalan tanah sementara yang dibina defendan adalah penyebab banjir tersebut. Isu utama dalam kes ini ialah sama ada banjir yang membanjiri kebun bunga orkid plaintif pada 28 Disember 2001 diakibatkan kecuaian defendan.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan mempunyai kewajipan berjaga-jaga ke atas plaintif kerana plaintif jelas terangkum dalam kategori individu yang secara langsung dan betul-betul menerima kesan tindak-tanduk defendan maka ia sewajarnya menjangka bahawa plaintif akan terjejas apabila defendan memikirkan tindakan-tindakan atau peninggalan-peninggalan yang dipersoalkan. Dalam mempertimbangkan sama ada defendan memungkiri tanggungjawabnya, mahkamah harus mempertimbangkan fakta-fakta khusus kes ini. Daripada fakta-fakta yang diperlihatkan melalui keterangan adalah jelas apabila defendan gagal membina jambatan konkrit merentasi sungai menurut pelan-pelan yang telah diluluskan dan gagal mematuhi syarat-syarat MDKT yang mana ia tidak laksanakan yang sepatutnya. Kemungkiran kewajipan ini jelas kelihatan apabila defendan membina jalan tanah sementara merentasi sungai tersebut dan memasang pembentung-pembentung di bawah sungai itu kerana tiada kelulusan untuk aktiviti-aktiviti itu. Maka, defendan telah melanggar kewajipan berjaga-jaga untuk mengambil langkah-langlah dan cara-cara yang perlu untuk mengelakkan tanah runtuh, banjir dan yang sepertinya berlaku ke atas tanah plaintif (lihat perenggan 12 & 21).

(2) Plaintif telah mengemukakan keterangan untuk menunjukkan bahawa banjir tersebut diakibatkan oleh aliran balik air disebabkan halangan pada sungai yang dibuat oleh defendan. Defendan mendakwa bahawa tanah tersebut berada dalam kawasan banjir tetapi dakwaan tersebut hanyalah spekulatif semata-mata. Jika dakwaan tersebut munasabah, tanah defendan tidak sesuai untuk dimajukan kepada kawasan perumahan. Dakwaan tersebut juga bercanggah dengan rekod-rekod yang menunjukkan tidak pernah berlaku banjir pada skala sebegitu dari 1998–2001. Hujahan defendan bahawa kejadian banjir tersebut merupakan bencana alam juga tidak berasas, salah tanggap dan bercanggah dengan fakta-fakta. Atas keseluruhan keterangan, adalah didapati bahawa kehilangan dan kerosakan ke atas tanah plaintif adalah disebabkan kemungkiran kewajipan berjaga-jaga defendan (lihat perenggan 23 & 25).

(3) Syarat-syarat yang ditetapkan oleh MDKT jelas menyatakan langkah-langkah yang perlu diambil oleh defendan untuk memastikan tiada tanah runtuh, banjir kilat dan seumpamanya berlaku. Defendan juga seharusnya dapat melihat sewajarnya bahawa aliran balik air banjir ke kebun bunga orkid plaintif akan merosakkan tanaman orkid, peralatan dan harta di atas kebun tersebut. Oleh itu, kehilangan dan kerosakan kebun bunga orkid plaintif dan juga kehilangan keuntungan kepada plaintif juga dapat dilihat sewajarnya oleh defendan (lihat perenggan 20 & 26).]

Notes

For cases on adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 776–790.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Blyth v Birmingham Waterworks Co (1856) 11 Exch 781, 784 (refd)

Bourhill v Young [1942] 2 All ER 396, HL (refd)

Canadian National Railway Company v Norsk Pacific Steamship Co Ltd [1992] 1 SCR 1021, SC (refd)

Donoghue v Stevenson (1932) AC 562, HL (refd)

Dr Abdul Hamid Abdul Rashid & Ors v Jurusan Malaysia Consultants (sued as a firm) & Ors [1997] 3 MLJ 546; [1999] 8 CLJ 131, HC (refd)

Fardon v Harcourt-Rivington [1932] 146 LT 391, HL (refd)

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103, FC (refd)

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, HL (refd)

Jaswant Singh v Central Electricity Board & Anor [1967] 1 MLJ 272, HC (refd)

Jolley v Sutton London Borough Council [2000] 1 WLR 1082 (refd)

Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors [1984] 1 MLJ 283; [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197, FC (refd)

Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109, HC (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)

Nepline Sdn Bhd v Jones Lang Wooton [1995] 1 CLJ 865, HC (refd)

Wagon Mound, The [1961] AC 388, PC (refd)

Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors [1999] 4 MLJ 9; [1999] 4 CLJ 339, HC (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)

Rajeswary Girupal (KB Rajah with him) (Nora SW Lam & Associates) for the plaintiff.

Thamil Chelevan (CS Tam & Co) for the defendant.

Vernon Ong J:

[1] The plaintiff's claim is for loss and damages caused by flood waters from the adjoining defendant's land inundating the plaintiff's orchid farm.

BRIEF ACCOUNT OF THE FACTS

[2] The plaintiff is the owner of an orchid farm located on a piece of land known as Lot 3350, Jalan Tai Hong, Kota Tinggi, Johor. The defendant is the owner of a piece of land which is adjacent to the plaintiff's orchid farm. There is a stream running through the orchid farm and the defendant's land At all material times the defendant was carrying out earthworks on their land. Some time about 28 December 2001 the stream burst its banks and flood waters inundated the plaintiff's orchid farm.

THE PLAINTIFF'S CASE

[3] The plaintiff has been carrying out orchid farming activities on their land since 1992 without any event of flooding on their orchid farm. The defendant was developing their land into a housing project and carried out earth works and tree felling. There is a stream which runs through the defendant and the plaintiff's land; this stream flows from the plaintiff's land which is situated upstream to the defendant's land which is situated downstream. The defendant built a temporary earth road/embankment across the stream to enable the defendant's lorries and vehicles to cross. The defendant negligently placed unsuitable and small culverts in the stream and underneath the temporary earth road/embankment which obstructed and hindered the natural free flow of the stream. A backflow of water from the stream was caused by the culverts/embankment's obstruction during a downpour so that on about 28 December 2001 the stream burst its banks and flooded the plaintiff's orchid farm. The flood waters reached a height of more than eight feet and totally submerged the plaintiff's orchid plants and damaged the plaintiff's properties. The flood waters receded and subsided after the plaintiff excavated and removed the culverts.

THE DEFENDANT'S CASE

[4] The defendant contends that they carried out the construction works guided by plans drawn up by its surveyors, engineers and architects which were approved by the relevant authorities. The plaintiff's land and the defendant's land were situated in flood prone areas. The floods which occurred at the end of 2001 were exceptionally huge so that both the plaintiff's and the defendant's land were inundated. The defendant installed three culverts with a diameter of three feet each to allow the flow of water in the stream from the plaintiff's land

to the defendant's land. The culverts were sufficient for the normal draining of stream water and rain water runoffs after ordinary rainfall. Even bigger size culverts would not have prevented the flooding on the plaintiff's land. The floods that occurred at the material time were beyond the defendant's control and were an act of God.

THE FACTS AS DISCLOSED IN THE EVIDENCE

[5] Mr Lee Chee Wee ('PW1') a director of the plaintiff company said that the flooding on the orchid farm occurred on 28 December 2001. PW1 recalled that it was raining continuously on that day and at about 5.30pm he noticed the rising water level. Together with some workers PW1 found that the water flow had been obstructed by culverts placed by the defendant beneath the stream. PW1's attempts to contact the defendant were unsuccessful. By 8.30pm some low areas of the orchid farm had been flooded and the staff had to be evacuated to higher grounds. The water level exceeded eight feet and submerged the orchid plants, knocked down the benchers and washed away the shade nets. The following morning PW1's brother Lim Chee Hock contacted the defendant about the problem. As the defendant refused to remove the temporary road and culverts, the plaintiff decided to remove them on their own. About three hours after the culverts were removed the water level subsided and started to flow easily. PWTs account of what transpired is corroborated by Mr Tan Seong Seng ('PW3') a vegetable wholesaler. PW3 was at the orchid farm on the night in question and he saw the effects of the flash flood. The plaintiff's farm manager Mr Chong Hing Kiw @ Chong Hin Poh ('PW4') also corroborated PW1's account. PW4 also took photographs of the flooding on the orchid farm (exh P9). The flooding event was also covered by the *China Press* newspaper on 30 December 2001 (exh P1).

[6] According to Mr Lim Geok Loon ('DW1') a director of the defendant's company, their development plans for a housing project were approved by the relevant authorities. Earthworks on the defendant's land were completed by 27 December 2001. The defendant built a temporary earth road across the stream and installed three culverts of three feet in diameter each on the stream. This was to enable lorries to cross the stream. DW1 agreed that at the end of 2001 and early 2002, flooding occurred at the plaintiff's land including the villages located downstream.

[7] Tuan Haji Esa Bin Abu Bakar ('PW2') is an engineer attached to the Majlis Daerah Kota Tinggi ('MDKT'). On 27 April 2001 the MDKT issued a letter of approval (exh P5) to the defendant before the defendant started earthworks and infrastructure works on the land. The approval was subject to certain conditions to be fulfilled by the defendant. PW2 said that the defendant did not satisfy the following conditions:

Para. 02. (iii) - Rekabentuk pembetung kekotak yang dicadangkan hendaklah tiada halangan ditengah-tengah saluran aliran air yang boleh menyebabkan pembetungan tersumbat, lebar pembetung hendaklah sama dengan rizab jalan (20 kaki).

Para. 0.2 (ix) - Paip pembetung yang merentasi jalan hendaklah mempunyai garispusat tidak kurang dari 900mm.

Para. 03. (a) to (d) - Pemaju adalah bertanggungjawab memastikan kestabilan, keselamatan, kesesuaian dan kecukupan muatan serta pembinaan cadangan jambatan melintasi Sungai Temboyoh yang dicadangkan untuk kawasan tapak cadangan pembangunan adalah sebagaimana pelan yang diluluskan.

Para. 03. (e) - Syaratnya, diantara lain, adalah pihak pemaju dan jurutera adalah bertanggungjawab 'diatas kesesuaian dan mengadakan langkah-langkah kawalan yang mencukupi untuk mengelak kesan buruk seperti hakisan tanah, banjir kilaf" dan sebagainya.

Para. 04. (01) - Kerja-kerja pemotongan dan penambakan kawasan ini adalah mengikut Undang-Undang Kecil Kerja Tanah MDKT1995.

Para. 04. (04) - Pemaju hendaklah mencari jalan bagi tidak menjadi kawasan persekitaran dan Kampung Batu 25 menimpa limpahan banjir lumpur ketika kerja-kerja dijalankan, diantara lain-lain syarat.

[8] PW2 also attended a meeting on 1 January 2002 at the Dewan Mesyuarat MDKT where one Mr KJ Kang a representative of the defendant company was also present. The meeting was convened to address the flash flood which inundated the plaintiff's land and surrounding areas on 27 December 2001. According to the minutes of the meeting (exh P6) the defendant was issued a stop work order (exh P7) until the defendant complied with all the conditions aforesaid. PW2 also said that the water flow in the stream was impeded and obstructed because the culverts were not of the correct size; the defendant also failed to take steps to prevent the surrounding areas from flash floods during the construction works. PW2 added that from the records and personal knowledge, there has never been flooding on this scale from 1998 to 2001.

[9] En Kamarudin bin Abdullah ('PW5') a consulting engineer produced a report on flood entitled 'Laporan Kejuruteraan Masalah Banjir Kilat Di Ladang Orkid' (exh P10). PW5 visited the plaintiff's land and the defendant's land on two occasions; the first visit was made two weeks after the flooding incident and the second visit to inspect and collect data at the site. P10 was prepared by Azhar bin Rohani ('PW6') a civil engineer. PW6 visited the site on 16 February 2002. PW6 saw the destruction and damage to the orchid farm caused by the flood. PW6's observations on the cause of flooding on the plaintiff's orchid farm are pertinent. He said:

... disebabkan aliran keluar kawasan tadahan ladang orkid milik plaintif telah terhalang oleh kerja-kerja tambakan tanah oleh pemaju tanah...(defendan). Sungai kecil tersebut tidak berfungsi kerana ditutup oleh pihak defendan untuk

memudahkan kerja-kerja tambakan tanah dibuat. Pihak defendan juga telah memasang dua paip pembetung berkembar bersaiz 600mm garispusat dibawah sungai yang ditutup itu. Tinjauan di tapak menunjukkan bahawa kerja-kerja penebangan pokok dan kerja-kerja tambakan tanah oleh defendan telah menambahkan kadar aliran air permukaan ke pembetungan tersebut dimana saiznya yang kecil tidak dapat menampung kuantiti air yang banyak. 'Berdasarkan pengiraan reka bentuk sebuah jambatan sepanjang 9.7 meter dan kedalaman 2.7 perlu dibina. Sekiranya pembetung digunakan, saiz pembetung mestilah lebih kurang 5 meter dalam ukuran diameter.

... sekiranya sungai tersebut tidak ditutup dan pembetungan dengan saiz yang lebih besar dipasang, kejadian tersebut tidak akan berlaku.... kerja-kerja tanah yang dilakukan oleh pihak defendan telah dilakukan tanpa mengira aspek hidrologi dengan hanya memasang pembetung dengan saiz yang tidak mencukupi untuk menampung kapasiti air yang banyak dari kesan tadahan yang menyumbang kepada kapasiti aliran sungai ketika hujan. Sepatutnya pembinaan jambatan dan perparitan yang bersesuaian dibina terlebih dahulu sebelum kerja penutupan anak sungai dilakukan sepertimana yang saya syorkan dalam Laporan.

ISSUE TO BE TRIED

[10] On the facts and issues as pleaded it is clear that the plaintiff's claim is founded in the tort of negligence. It is contended that the flood to the plaintiff's orchid farm was due to the earthworks and construction works being carried out negligently by the defendant on the defendant's land. In the premises the principal issue to be determined is whether the flood which inundated the plaintiff's orchid farm on 28 December 2001 was brought about by the defendant's negligence?

THE LAW ON NEGLIGENCE

[11] The law on negligence is settled. In order to establish a case against the defendant in the tort of negligence, the plaintiff must prove four ingredients: (a) that the defendant owed the plaintiff a duty to take reasonable care; (b) that the defendant breached that duty; (c) that the loss and damages were caused by the defendant's breach; and (d) that the loss and damages is not too remote or unforeseeable.

Whether a duty of care existed?

[12] To determine whether in any given circumstances a duty was owed by one party to another the courts have traditionally applied the Atkinian test in the well known case of *Donoghue v Stevenson* [1932] AC 562, 580 (see *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109; *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283; [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197). In the words of Lord Atkins, the test is as follows:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Whether there was a breach of the duty of care?

[13] If it can be shown that a duty of care exists, then the court will go on to consider whether there has been a breach of that duty to take reasonable care. This is a pure question of fact. As to what constitutes a breach, in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585 Gopal Sri Ram JCA (later FCJ) referred to the test as applied in three English cases. The test as formulated by Baron Alderson in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, 784 is as follows:

> [T]he omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The test according to Lord Dunedin in *Fardon v Harcourt-Rivington* (1932) 146 LT 391:

> If the possibility of the danger emerging is reasonably apparent, then to take no precaution is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.... In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

And the test as stated by Lord Macmillan in *Bourhill v Young* [1942] 2 All ER 396, 403 in the following manner:

> The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if that duty is not observed.

[14] In other words, whether a breach of a duty to take care existed depends on whether in a given situation a party did something which he ought not to have done, or omitted to do something which he ought to have done. The test is objective and subjective. It is subjective because whether he did something or omitted to do something turns on the particular facts of the case. However,

whether the act or omission amounted to a breach of duty is determined by what a reasonable and prudent man would or would not do in the circumstances — the objective test.

Whether the loss and damages was caused by the breach of duty?

[15] This is a question of fact; whether the flood was caused by the defendant's negligence turns on the particular facts and circumstances of this case (*Canadian National Railway Company v Norsk Pacific Steamship Co* [1992] 1 SCR 1021).

Whether the damages is not too remote?

[16] It is also settled law that the test is that of reasonable foreseeability — ie, a plaintiff can only recover that loss which a defendant could reasonably foresee as arising from his breach of duty (*The Wagon Mound* [1961] AC 388 (PC); *Jaswant Singh v Central Electricity Board & Anor* [1967] 1 MLJ 272; *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103). In *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors*, the Court of Appeal citing *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082, 1089 also said that whether a particular kind of harm was reasonably foreseeable is a question of fact that depends upon the peculiar facts of each case. Whether the damage is too remote or not is not to be determined by the nature of the damage itself, whether physical loss or pure financial loss. Instead the question is whether the scope of the duty of care in the circumstances of the case is such as to include damage of the kind which the plaintiff claims to have sustained, whether it be injury to person or property or pure economic loss. In other words, the question to be determined is whether the injury to person or property or pure economic loss to the plaintiff was reasonably foreseeable by the defendant.

[17] In the law of negligence as recognised in all major Commonwealth jurisdictions pure economic loss is recoverable in negligence. In Malaysia the Federal Court recognised that pure economic loss is recoverable in negligence under limited circumstances. In *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1 (FC) Steve Shim CJSS agreed with the view that the critical question is not the nature of the damage itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained. He accepted the 'open ended approach' taken by the courts in Australia and Singapore that claims for pure economic loss in the law of negligence are not precluded and will depend on the facts and circumstances of each individual case; adding, however, that caution should be exercised in extending the principle in *Donoghue v Stevenson* to new situations. On this issue Abdul Hamid Mohamad FCJ (later CJ) observed that there had only been a few judgments of Malaysian courts and all at High Court level. In

three cases the claims for pure economic loss were dismissed by the trial judges because there was no injury to person or property. In two other cases Abdul Hamid Mohamad FCJ had in *Nepline Sdn Bhd v Jones Lang Wooton* [1995] 1 CLJ 865 allowed the claim after resorting to s 3(1) of the Civil Law Act 1956, following and extended *Hedley Byrne* on the basis that there was fiduciary relationship between the parties. In the other case of *Dr Abdul Hamid Abdul Rashid & Ors v Jurusan Malaysia Consultants (sued as a firm) & Ors* [1997] 3 MLJ 546; [1999] 8 CLJ 131 James Foong J (now FCJ) appears to base his decision to allow economic loss on his concern that otherwise 'the entire group of subsequent purchasers in this country (would be left) without relief against errant builders, architects, engineers and related personnel who are found to have erred'. Abdul Hamid Mohamad FCJ concluded that the decision whether to accept claims for pure economic loss in negligence in limited cases should be based on s 3(1) of the Civil Law Act 1956 taking into consideration the local circumstances.

FINDINGS OF THE COURT

Whether the defendant owed a duty of care to the plaintiff?

[18] As owners and occupiers of adjoining land it is evident that a duty of care situation existed between the plaintiff and the defendant. Both the plaintiff and the defendant fall clearly within the category of persons described in the Atkinian test. In other words, the plaintiff is so closely and directly affected by the defendant's act that the defendant ought reasonably to have the plaintiff in contemplation as being so affected when the defendant is directing its mind to the acts or omissions which are called in question (see *Wu Siew Ying v Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* [1999] 4 MLJ 9; [1999] 4 CLJ 339 where the High Court found that a duty of care situation existed between occupiers of adjoining land).

Whether the defendant breached that duty of care?

[19] In this regard it is necessary to consider two questions. First, whether the defendant did anything which the defendant ought not to have done. Second, whether the defendant omitted to do something which the defendant ought to have done. The answer to these questions turns on the peculiar facts of this case. At all material times the defendant was carrying out earth works and construction works on their land.

[20] The conditions were imposed by MDKT in P5 required the defendant to take the necessary steps and measures to prevent landslides, floods and the like from happening not only to the defendant's land but the surrounding areas as well. Under cross-examination DW1 agreed that according to the approved plans the defendant was required to build a concrete bridge over the stream measuring at least 100 feet by 40 feet. However, there was no concrete bridge;

instead the defendant built a temporary earth road cum embankment across the stream. The defendant also installed three culverts measuring three feet in diameter each under the stream. PW2 testified that as the defendant failed to comply with a number of conditions a stop-work order was issued by MDKT to the defendant.

[21] In the light of the facts as disclosed in the evidence, when the defendant failed to build the concrete bridge over the stream in accordance with the approved plans and the conditions in P5, the defendant omitted to do what it ought to have done. The defendant's breach of duty was further compounded when the defendant built the temporary earth road cum embankment over the stream and installed culverts under the stream. PW2 said that no approval was given to the defendant to build a temporary earth road cum embankment across the stream. In doing so the defendant did what the defendant ought not to have done.

[22] In this regard the court also finds that DW1's evidence that the defendant complied with all the conditions in P5 is unsubstantiated. It also flies in the face of PW2's testimony and P5. Under cross-examination DW1 initially denied any knowledge of the fact that the defendant's representative attended the meeting at MDKT on 11 January 2002 or that a stop work order was issued. DW1's evidence is contradicted by P6 which recorded that the defendant's representative one Mr KJ Kang attended the meeting. DW1 also contradicted himself when he later agreed that after the stop work order was issued, the defendant complied with the conditions to build a concrete bridge in 2004. On the whole DW1's evidence is inconsistent and unreliable. For the foregoing reasons the Court finds that the defendant breached that duty of care to take the necessary steps and measures to prevent landslides, floods and the like from happening to the plaintiff's land.

Whether the loss and damage were caused by the defendant's breach of duty of care?

[23] According to the evidence the flood was brought about by the backflow of water due to the obstruction of the stream caused by the temporary earth road cum embankment built by the defendant. In this respect the evidence of PW1 is particularly pertinent as he was present when the water level started to rise and the flood waters inundated the plaintiff's orchid farm. PW1 and his workers saw the blockage caused by the temporary earth road cum embankment which led to the backflow of water gushing into the plaintiff's orchid farm. PW1's evidence is corroborated by PW2's testimony that the water flow in the stream was impeded and obstructed because the culverts were not of the correct size and that the defendant also failed to take steps to prevent the surrounding areas from flash floods during the construction works.

[24] The findings of PW5 and PW6 as set out in their report (P10) also points to the temporary earth road cum embankment as the cause of the flood. P10 is a comprehensive report and it states that the flooding on the plaintiff's orchid farm was due to the overflow of the stream due to earth works and the embankment works whereby the defendant placed two culverts measuring 600mm in diameter under the stream. The increased flow of the stream water was also contributed by tree felling and embankment works carried out by the defendant. P10 was not challenged or contradicted under cross-examination. Both PW5 and PW6 visited the plaintiff's land and the defendant's land to inspect and collect data for their assessment on the cause of the flooding on the plaintiff's land. PW5 and PW6's evidence are consistent and credible; they were unshaken during cross-examination.

[25] The court also considered DW1's remarks that the plaintiff's land and the defendant's land were flood prone areas. However, DW1's remarks are merely speculative as he admitted that he resided in Singapore, that he did not visit the site in December 2001 and that he was in Kota Tinggi only twice in 2001. If DW1's remarks are plausible, then the defendant's land would not be suitable to be developed into a housing estate. Further, DW1's remarks are contradicted by PW2 who said that from the records and his personal knowledge, there has never been flooding on this scale from 1998 to 2001. Accordingly, the defendant's contention that the defendant is not responsible as it had complied with all the approved plans is devoid of merits. Further, the defendant's contention that the flood which inundated the plaintiff's orchid farm was an act of God is unsubstantiated, misconceived and contrary to the facts. On the totality of the evidence the court finds that the loss and damage to the plaintiffs orchid farm was caused by the defendant's breach of its duty of care.

Whether the damage is not too remote?

[26] To answer this question it is necessary to ascertain whether the loss and damage to the plaintiff's orchid farm and the economic loss to the plaintiff was reasonably foreseeable by the defendant. Applying the principles enunciated above to the facts of this case, the court finds that the scope of the duty of care is such as to include the loss and damage which the plaintiff claims to have suffered and sustained. This is evident in the tenor of P5; in particular MDKT's condition in paras 03. (e) and 04. (04) which makes the defendant responsible to ensure that no land slides, flash floods and the like occur at the defendant's site and surrounding areas. In fact, the conditions in P5 clearly set out the measures to be taken by the defendant to ensure that the flow of water in the stream was smooth and unobstructed. In this light the defendant would have reasonably foreseen that the backflow of the flood waters into the plaintiff's orchid farm would destroy the orchid plants, the sheds and equipment and other property on the farm. The defendant would also have reasonably foreseen

that as a result of the flood, the plaintiff's business would be brought to a standstill thereby bringing about economic loss upon the plaintiff.

[27] For the reasons adumbrated above the court finds that the flood which inundated the plaintiff's orchid farm on 28 December 2001 was brought about by the defendant's negligence. Accordingly, the plaintiff's claim is allowed with costs of RM12,000 with damages to be assessed by the deputy registrar.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan